

Hon. Mary Alice Theiler

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

BWP Media USA Inc., d/b/a Pacific
Coast News

Cause No. 2:13-cv-01975

Plaintiff,

**DEFENDANT'S MOTION
FOR ATTORNEY'S FEES**

v.

Rich Kids Clothing Company, LLC,
Defendant.

Noted: February 27, 2015

COMES NOW Defendant Rich Kids Clothing Company, LLC (RKCC), by and through undersigned counsel, and submits this motion for an order directing that Plaintiff BWP Media USA, Inc. (BWP) reimburse RKCC a reasonable attorneys' fee for defending this matter. RKCC respectfully requests an award of a reasonable attorneys fees pursuant to 17 U.S.C. § 505. RKCC is the prevailing party by virtue of the Final Judgment (Dkt 31) entered on January 23, 2015. The estimated amount of RKCC's attorneys' fees is \$24,290.

SUMMARY OF ARGUMENT

In this action, Plaintiff BWP Media USA Inc., filed suit against RKCC alleging that RKCC copied and displayed BWP's photographs on the www.richkidsbrand.com website ("the RKCC website"). The documents filed in connection with BWP's complaint were inadequate to sustain its alleged cause of action. RKCC considered filing a

1 motion under Rules 12(b)(6) or 12(c), but declined to do so with the
 2 expectation that any actual evidence BWP possessed would be
 3 produced through discovery. As this Court is aware, no such
 4 production occurred, and RKCC moved for summary judgment of
 5 non-infringement. In the course of that briefing, BWP produced, for
 6 the first time, a single, questionable document purporting to support
 7 BWP's claim. However, upon RKCC's motion, this Court struck
 8 BWP's late-produced evidence leaving BWP with no evidence upon
 9 which its claim could move forward. (Dkt 30). Accordingly, judgment
 10 was granted in favor of RKCC and against BWP as to BWP's claims
 11 of copyright infringement. Thus, as the prevailing party, RKCC now
 12 requests reimbursement of its attorneys fees under Section 505 of the
 13 Copyright Act.

14 DISCUSSION AND AUTHORITIES

15 I. RKCC Should Be Awarded Its Reasonable Attorneys' 16 Fees Incurred In Connection With This Matter

17 Section 505 of the Copyright Act provides that, in civil
 18 copyright actions, the Court may "award a reasonable attorney's fee
 19 to the prevailing party as part of the costs." 17 U.S.C. § 505. By
 20 virtue of this Court's entry of summary judgment, RKCC is the
 21 prevailing party. See *Maljack Prods., Inc. v. GoodTimes Home Video*
 22 *Corp.*, 81 F.3d 881, 890 (9th Cir. 1996). Courts in this Circuit
 23 generally consider the following nonexclusive factors when
 24 considering whether to grant an award of attorneys' fees in a
 25 copyright action.¹ (1) the degree of success obtained; (2) frivolousness

26 ¹Several Circuits have held that, in accord with *Fogerty*, awards of fees are "the rule rather than
 27 the exception and [they] should be awarded routinely." *Positive Black Talk Inc. v. Cash Money*
Records, Inc., 394 F.3d 357, 381 (5th Cir. 2004) abrogated on other grounds by *Reed Elsevier, Inc.*

1 of the action; (3) motivation of the plaintiff; (4) objective
 2 unreasonableness (both in the factual and in the legal components of
 3 the case); and (5) the need to advance considerations of compensation
 4 and deterrence. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 & n.19
 5 (1994); *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d
 6 869, 883 (9th Cir. 2005). All of those factors weigh in favor of
 7 awarding RKCC its attorneys' fees in defending this action.

8 **A. RKCC Achieved Complete Success on the Merits**

9 The Court resolved the entirety of BWP's claims in favor of
 10 RKCC. Thus, RKCC achieved complete and total success in this
 11 action. Accordingly, this factor weighs in favor of a fee award to
 12 RKCC. See *Maljack Prods.*, 81 F.3d at 890 (award of attorneys' fees
 13 proper where defendant, for which summary judgment was granted,
 14 "obtained total success in defending against [plaintiff's] copyright
 15 claims"); *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367,
 16 1375 (N.D. Ga. 2005) (where "Court granted summary judgment in
 17 favor of defendants as to plaintiff's copyright infringement, federal
 18 trademark, and state law claims . . . defendants are clearly the
 19 prevailing parties on all claims.").

20 **B. Plaintiff's Claims Were Objectively Unreasonable**

21 Unreasonableness is an objective standard, and thus a
 22 plaintiff's ignorance of the facts or the law before filing does not
 23

24 *v. Muchnick*, 559 U.S. 154 (2010) (internal citations omitted); see, e.g., *Thoroughbred Software*
 25 *Intern., Inc. v. Dice Corp.*, 488 F.3d 352, 362 (6th Cir. 2007). This is particularly true when the
 26 prevailing party is the defendant. *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824
 27 (7th Cir. 2005) ("When the prevailing party is the defendant ... the presumption in favor of
 awarding fees is very strong. For without the prospect of such an award, the party might be forced
 into a nuisance settlement or deterred all together from exercising his rights.")

1 negate objective unreasonableness. See *Maljack*, 81 F.3d at 889;
2 *Budget Cinema, Inc. v. Watertower Associates*, 81 F.3d 729, 732-33
3 (7th Cir. 1996) (awarding attorneys' fees where plaintiff knew or
4 should have known that it lacked ownership of the copyright upon
5 which it sued). The Court need not find that Plaintiff's claims were
6 frivolous in order to award attorneys' fees. See *Fogerty*, 510 U.S. at
7 527, 532 n.18 (rejecting argument that attorneys' fees award to a
8 defendant "represents a penalty imposed upon the plaintiff for
9 institution of a baseless, frivolous, or unreasonable suit, or one
10 instituted in bad faith"). Indeed, unreasonableness is not even a
11 prerequisite to a fee award. *Garcia-Goyco v. Law Envtl. Consultants,*
12 *Inc.*, 428 F.3d 14, 21 (1st Cir. 2005) (fee award appropriate even
13 without express finding of frivolity); *Matthews v. Freedman*, 157
14 F.3d 25, 29 (1st Cir. 1998) ("Depending on other circumstances, a
15 district court could conclude that the losing party should pay even if
16 all of the arguments it made were reasonable.").

17 In this matter, BWP filed a complaint for copyright
18 infringement which, on its face, was frivolous. As noted in the
19 summary judgment briefing, BWP filed its claim of copyright
20 infringement supported only by exhibits which purport to show that
21 RKCC copied BWP's images. (Dkt 1). However, a review of BWP's
22 exhibits reveal that it failed to identify any image at all on the RKCC
23 website that is even remotely similar to BWP's images. (Dkt 1-3).

24 Although BWP produced one untimely document purporting to
25 show the RKCC website with BWP's images on it, that document was
26 never produced during discovery; which led this Court to exclude it
27 on summary judgment. (Dkt 30). Although that document purports to

1 show BWP's images on RKCC's website, it's veracity was never
2 subject to challenge as it would have if it been properly produced
3 during discovery. Perhaps that is why it was never produced; we will
4 never know. However, based simply on the information already
5 available to RKCC, it was able to identify a number of apparent
6 inconsistencies with that document which drastically undermines its
7 reliability. See Dkt 23, pages 3-5.

8 In short, BWP never provided any admissible evidence upon
9 which any trier-of-fact could conduct a side-by-side comparison
10 necessary to prove copyright infringement. See *DiTocco v. Riordan*,
11 496 F. App'x 126, 128 (2d Cir. 2012)(a visual comparison of the works
12 is required); c.f., *Eden Toys, Inc. v. Florelee Undergarment Co. Inc.*,
13 697 F.2d 27, 35 (2d Cir. 1982). Such a fundamental failure
14 demonstrates that BWP's claim was unreasonable at a minimum,
15 and perhaps even frivolous.

16 The Court's findings on summary judgment confirm that this
17 case was objectively unreasonable. BWP's claims were not supported
18 by the facts, and it should have recognized this before filing and
19 pursuing this action through summary judgment. Accordingly, this
20 factor weighs in favor of an award of attorneys' fees.

21 C. BWP's Motivation In Filing Suit Warrants An Award 22 of Attorneys Fees

23 BWP's motivation in filing this suit is perhaps the single most
24 compelling factor in favor of an award of attorneys' fees. BWP has
25 filed nearly 200 such actions against various defendants for
26 essentially identical claims of copyright infringement.² RKCC is

27 ² The Court may take judicial notice of public-court filings as reported at the following link:

1 unaware about the details of those other cases, but in the instant
 2 case BWP filed this Federal lawsuit without ever even contacting
 3 RKCC about the dispute. In addition, BWP's settlement demands
 4 drastically exceeded any reasonable recovery BWP could possibly
 5 have expected. More specifically, BWP's initial settlement demand
 6 was \$30,000, which is exactly **30 times** what it represented to this
 7 Court was its damages expectation. See Whitaker Decl, ¶ 5, Ex. A;
 8 Dkt 17, page 23 ("Plaintiff respectfully requests that the Court grant
 9 it statutory damages in the amount of one thousand dollars
 10 (\$1,000.00)"). Indeed, BWP's settlement demand even exceeded
 11 everything that it asked for in relief from this Court. *Id.*

12 Even more compelling is how BWP used the specter of
 13 attorney's fees to put RKCC to Hobson's choice. In other words, BWP
 14 made it perfectly clear that RKCC would either pay \$30,000 to BWP
 15 in settlement, or RKCC would pay its own counsel \$30,000 to defend
 16 this action. Such is clear from BWP's settlement demand, in which
 17 BWP's counsel informed RKCC that if RKCC did not accept BWP's
 18 outrageous settlement demand, RKCC could expect to spend
 19 substantial sums to respond to mounting discovery propounded by
 20 BWP. See Whitaker Decl., ¶ 5, Ex. A.

21 In summary, BWP's business model is to use the threat of
 22 attorneys' fees to extract exorbitant settlement demands from
 23 litigants who, like RKCC, did nothing wrong. BWP's motivation in
 24 this matter supports an award of attorneys' fees in favor of RKCC.
 25 See *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 359-60
 26 (S.D.N.Y. 2006) (attorneys' fees should be awarded to deter plaintiffs

27 <http://dockets.justia.com/search?parties=%22BWP+Media+USA%22&cases=mostrecent>

1 “from bringing unreasonable claims based on a cost/benefit analysis
2 that tells such plaintiffs that they can score big if they win and that
3 there will be no adverse consequences if they lose”).

4 **D. A Fee Award Will Advance Considerations of**
5 **Compensation And Deterrence**

6 BWP’s decision to file this lawsuit knowing that its claims were
7 not supported was reckless, at best. At worst, it was a misguided
8 attempt to force a nuisance settlement as set forth above. Interests of
9 fairness and equity compel that RKCC be compensated for the
10 attorneys’ fees incurred in defending this lawsuit. *Assessment Tech.*
11 *of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004)
12 (award of attorneys’ fees is necessary to compensate a defendant for
13 being forced to defend a “marginal” suit, because “[u]nless a party in
14 that situation has a prospect of obtaining attorneys’ fees, it will be
15 under pressure to throw in the towel if the cost is less than the
16 anticipated attorneys’ fees.”); *Harrison Music Corp. v. Tesfaye*, 293 F.
17 Supp. 2d 80, 85 (D. D.C. 2003) (“The Copyright Act seeks to
18 stimulate artistic creativity for the general public good and
19 discourage infringement. Awarding attorney’s fees addresses these
20 goals because it enables people to vindicate or defend their rights
21 where it would otherwise be uneconomical to do so.”)(internal
22 citations omitted). Without financial consequences, there is nothing
23 to discourage BWP or others from filing similar lawsuits in the
24 future. See *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F. Supp. 2d 663,
25 668 (S.D.N.Y. 2001)(“This case presented a straightforward copyright
26 infringement claim that was objectively unreasonable. ... Failing to
27 award attorneys’ fees to defendants in such situations would invite

1 others to bring similarly unreasonable actions without fear of
 2 consequences.”).

3 A fee award will further the interests of the Copyright Act, and
 4 “[t]he Ninth Circuit has held that faithfulness to the purposes of the
 5 Copyright Act is ... the pivotal criterion.” *Bernal v. Paradigm Talent*
 6 *& Literary Agency*, No. CV 07-06445 SVW (PLAx), 2010 WL 6397561,
 7 at *2 (internal citations omitted). Accordingly, this factor weighs in
 8 favor of an award of attorneys’ fees in favor of RKCC.

9 **II. RKCC’S ATTORNEYS’ FEES ARE REASONABLE**

10 Plaintiff filed this action in October of 2013. Over the
 11 approximately 15 months that the case was pending, RKCC incurred
 12 approximately \$24,290 in attorneys’ fees. Both the nature of the work
 13 actually performed and the rates charged by RKCC’s counsel were
 14 reasonable. Accordingly, RKCC requests an award of \$24,290.

15 **A. Legal Standard For Fees Award**

16 The Copyright Act provides that the prevailing party may
 17 recover a “reasonable attorney’s fee.” A reasonable attorney’s fee is
 18 generally determined based on the so-called “lodestar” calculation of
 19 “number of hours reasonably expended on the litigation multiplied by
 20 a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433
 21 (1983) (civil rights action).

22 Courts determine the reasonableness of the rate for attorneys’
 23 fees based on the rates for similar services by attorneys of similar
 24 experience in the relevant community. *Blum v. Stenson*, 465 U.S.
 25 886, 895 (1984) (civil rights action). “The relevant community
 26 includes ‘attorneys practicing in the forum district’ – that is, the
 27

1 district in which the court sits.” *Bernal*, 2010 WL 6397561, at *6,
 2 quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir.1992).

3 **B. The Work Performed Was Reasonable**

4 During the 15 months that this case was litigated, RKCC’s
 5 counsel performed a substantial number of tasks strictly necessary
 6 to defend this action, including: reviewing and analyzing Plaintiff’s
 7 Complaint; preparing and filing an Answer; analyzing and
 8 researching the facts of the case and RKCC’s defenses to Plaintiff’s
 9 infringement claims; responding to Plaintiff’s written discovery;
 10 conducting numerous discovery conferences concerning Plaintiff’s
 11 demand for production of documents and supplemental discovery
 12 responses; preparing supplemental discovery responses; preparing
 13 RKCC’s motion for summary judgment and reply in support thereof;
 14 and responding to Plaintiff’s motion for summary judgment. See
 15 Whitaker Decl., ¶ 6, Ex. B. As set forth in the invoices attached
 16 thereto, RKCC’s time was spent exclusively on the relevant and
 17 necessary tasks.

18 **C. RKCC’s Counsel’s Rate Is Reasonable**

19 During the course of this litigation, RKCC was represented by
 20 one attorney, John Whitaker. Mr. Whitaker has substantial expertise
 21 in intellectual property litigation. See Whitaker Decl., ¶¶ 6-7. Mr.
 22 Whitaker has participated in numerous intellectual property jury
 23 trials and a large number of federal litigation matters. *Id.* Mr.
 24 Whitaker has roughly nineteen years of experience and has practiced
 25 exclusively in the area of intellectual property his entire career.
 26 Whitaker Decl., ¶ 3.

1 Mr. Whitaker's billable rate is \$350 per hour. Attached are the
2 declarations of Philip P. Mann and Gregory Wesner, colleagues of
3 Mr. Whitaker's who have substantial experience in this industry.
4 Both of those individuals attest that Mr. Whitaker's billable rate is
5 reasonable for his experience and expertise in this industry and
6 region. See Mann Decl, Wesner Decl. Accordingly, the billable rate
7 charged by RKCC's counsel is reasonable.

8 **D. The Requested Fee Award Is Objectively**
9 **Reasonable Compared to Similar Litigation**

10 Finally, RKCC's attorney's fee award request is reasonable even
11 when compared to other such litigation matters throughout the
12 nation. The American Intellectual Property Law Association (AIPLA)
13 conducts an annual survey of the average costs of litigation for
14 intellectual property matters, including similar copyright actions.
15 Attached as Exhibit C to the Whitaker Declaration is a summary of
16 the 2013 AIPLA survey. As is evident from that summary, the
17 average cost of copyright infringement litigation through discovery
18 where the amount in controversy is less than \$1 Million is
19 approximately \$216,000. RKCC's requested attorneys' fee award
20 (\$24,290) obviously pales in comparison to those numbers.
21 Accordingly, RKCC's award is objectively reasonable.

22 **CONCLUSION**

23 RKCC respectfully requests that this Court enter an award of
24 attorneys' fees against BWP and in favor of RKCC pursuant to 17
25 U.S.C. § 505. RKCC estimates that its attorneys' fees reasonably
26
27

1 incurred in defending this matter are \$24,290. Accordingly, RKCC
2 respectfully requests an award in that amount.
3

4 Dated: February 6, 2015.

Respectfully submitted,

5 

6 John Whitaker, WSBA 28868

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13 Attorneys for Defendant

14 Rich Kids Clothing Company,

15 LLC
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CERTIFICATE OF SERVICE

I, John Whitaker, hereby certify that on the date indicated below, I caused a true and correct copy of the foregoing to be served on all parties who have appeared in this matter.

Dated: February 6, 2015

s/ John Whitaker